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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

## No. 607.

The State of Missouri, at the Relation of Mildred B. Johnson, Administratrix of the Estate of John T. Barker, Deceased, and Mary G. Jacobs, Executor of the Estate of Floyd E. Jacobs, Deceased; and Mildred B. Johnson, Administratrix of the Estate of John T. Barker, Deceased, and Mary G. Jacobs, Executrix of the Estate of Floyd E. Jacobs, Deceased,

*Appellants,*

vs.

Jack L. Clay (Successor to C. Lawrence Leggett), Superintendent of the Division of Insurance, Department of Business and Administration of the State of Missouri et al.,

*Appellees.*

APPEAL FROM THE SUPREME COURT OF MISSOURI.

**APPELLANTS' BRIEF IN OPPOSITION TO SEPARATE MOTIONS TO AFFIRM OR IN THE ALTERNATIVE TO DISMISS OF APPELLEES.**

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APPEAL FROM THE SUPREME COURT OF MISSOURI.

## APPELLANTS' BRIEF IN OPPOSITION TO SEPARATE MOTIONS TO AFFIRM OR IN THE ALTERNATIVE TO DISMISS OF APPELLEES.

Appellants respectfully submit the following suggestions in opposition to the Separate Motions to Affirm or Dismiss of all Appellees.

Appellees contend this Court does not have jurisdiction of this appeal. In addition to the authorities cited in our Jurisdictional Statement we desire to call the attention of the Court to the case of *Marcus* v. *Search Warrants of Property, etc.*, 367 U.S. 717, 721, 81 S. Ct. 1708, 1711, holding this Court had jurisdiction of a case where the Supreme Court of Missouri sustained the validity of the State procedures as applied in that case. We have that situation here.

Appellees' motions and arguments are so confusing and misleading we deem it necessary to make a brief summary of the essential facts.

Two distinguished Missouri lawyers, John T. Barker (later an assistant Attorney General of the United States) and Floyd E. Jacobs were legally employed by the Superintendent of Insurance of Missouri to bring an action against Aetna and other insurance companies for restitution of excess premiums illegally collected by them. They were employed by written contract to receive their compensation on a contingent basis out of the funds collected. Working over a period of six years in many Courts they succeeded in obtaining judgment against the insurance companies in the sum of $2,751,000.00. After all policyholders were reimbursed who could be found there remained the sum of $2,160,871.32 which was escheated into the treasury of the State of Missouri (295 S.W.2d, l.c. 838). The Trial Court allowed Barker and Jacobs a fee for their services of $275,000.00, but on appeal the Supreme Court of Missouri held they had a valid contract which they had performed but that this fund was a sacred fund for the policyholders and could not be used to pay fees (*Aetna Ins. Co.* v. *O'Malley*, 124 S.W.2d 1164). They filed and had pending before the Superintendent of Insurance a claim for fees for such

services from 1936 until it was finally peremptorily and without a hearing denied by the Superintendent on February 7, 1958 (359 S.W.2d, l.c. 796). In the meantime Barker and Jacobs sought repeatedly to collect fees for their services from the fund after it was apparent that a large sum would be left over after all policyholders were paid and even after the money had been escheated into the Missouri State Treasury. Always their claims were denied upon the ground this fund was not available to pay them but remained sacred even when escheated into the State Treasury. They applied to the legislature for payment several times, but with no help from the Superintendent, were unsuccessful. Aetna in its brief here on page 10 truthfully states: "In no instance did these cases attempt to decide the merits of the claims." However, on the next page it makes this statement: "Time and again the appellants' claims have been presented, heard and ruled against them" Barker and Jacobs have never had a hearing of their claims on the merits and never will without relief from this Court.

At the time of Appellants' contract in 1930, there was available to them to control and review the acts of the Superintendent the usual common law forums and remedies. But in 1945, the Missouri Legislature passed an Administrative Procedure Act, (Chapter 536, R.S. Mo. 1959) making the procedure there provided the sole remedy for review of all state agencies, including the Division of Insurance.

In the same year by a provision in the 1945 Constitution (Art. IV, Secs. 22 and 25) there was established a governor's budget requiring the Superintendent to include estimates for his division in this budget and providing that no appropriation not recommended in such budget

could be acted upon until all recommendations in the budget were acted upon. This eliminated any reasonable opportunity to obtain a legislative appropriation.

The Missouri Courts held Appellants did have a remedy under the Insurance Code and the Administrative Procedure Act, *State ex rel. Leggett* v. *Jensen*, 318 S.W.2d 353. Aetna admits this in its brief here pp. 4 and 5. In the present opinion the Missouri Supreme Court holds that the Superintendent had the right to deny appellants' claims without a hearing and that his discretion in the matter is not subject to judicial review, thus foreclosing their rights to a hearing on the merits and any judicial forum or judicial remedy.

On page 4 of its brief here Aetna states that Barker and Jacobs received $100,000 through an appropriation by the legislature thereby intentionally representing that such amount was received in part payment for services in this proceeding. For authority for that statement it refers to page 792 of 359 S.W.2d. The local citation is obviously in error as that subject is mentioned only on page 794. It is there shown that this payment was made under an act reported in the Missouri Laws, 1931, p. 69, Sec. 11. Appellants' employment in the present matter was in June, 1930, on a contingent basis and their services were not completed and they made no claim for services until December, 1935, when they were awarded $275,000.00 which was set aside in 124 S.W.2d 1164 on the ground the Court had no authority to allow fees to be paid out of this fund because of its sacred character. The *Aetna* case, 124 S.W.2d 1164, mentions no such payment as involved. The allowance referred to was for another and different employment and is brought in here only for confusion and to prejudice the Court.

## I.

**The Validity of the Designated Missouri State Statutes Was Drawn in Question in the State Courts As Being in Violation of the Fourteenth Amendment and Article X, Section 1 of the Constitution of the United States.**

The subject of the manner of raising the Constitutional questions is covered on pages 15 to 18 of our Jurisdictional Statement.

The Missouri Supreme Court, *en Banc*, held that upon the Superintendent of Insurance refusing to allow Appellants fees under the Missouri Insurance Code, Chapter 374, R.S. Mo., 1959, the only procedure open to Appellants was under the Missouri Administrative Procedure Act, Chapter 536, R.S. Mo., 1959. *Jacobs* v. *Leggett*, Mo. Sup., 295 S.W.2d 825; *Barker* v. *Leggett*, Mo. Sup., 295 S.W.2d 825; *State ex rel. Leggett* v. *Jensen*, Mo. Sup., 318 S.W.2d 353.

Under such rulings Appellants were forced to proceed under the Missouri Insurance Code and Administrative Procedure Acts. In construing said statutes so as to deny Appellants any recovery the Missouri Courts necessarily ruled in favor of the validity of said statutes as so construed by them.

Any contention that the construction put upon these statutes is contrary to the terms of the statutes is unavailing.

In the case of *State of Minnesota* v. *Probate Court*, 309 U.S. 270, 273, 60 S. Ct. 523, the Court said (l.c. 525):

> "Any contention that the construction is contrary to the terms of the Act is unavailing here. For the purpose of deciding the constitutional questions appellant raises we must take the statute as though it read precisely as the highest court of the State has in-

terpreted it. Supreme Lodge, Knights of Pythias v. Meyer, 265 U.S. 30, 32, 44 S. Ct. 432, 68 L. Ed. 885; Guaranty Trust Company v. Blodgett, 287 U.S. 509, 513, 53 S. Ct. 244, 245, 77 L. Ed. 463; Hicklin v. Coney, 290 U.S. 169, 172, 54 S. Ct. 142, 144, 78 L. Ed. 247; Georgia Railway & Electric Co. v. Decatur, 295 U.S. 165, 170, 55 S. Ct. 701, 703, 79 L. Ed. 1365."

In the case of *Poulos* v. *State of New Hampshire*, 345 S. Ct. 395, 403, 73 S. Ct. 760, the Court said (l.c. 765):

"While there was no assertion of the invalidity of the ordinance on its face, the Supreme Court determined the validity of the ordinance as applied. See Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 287, 42 S. Ct. 106, 107, 66 L. Ed. 239; Charleston Federal Sav. & Loan Ass'n v. Alderson, 324 U.S. 182, 185-186, 65 S. Ct. 624, 627, 89 L. Ed. 857."

In the case of *Hartford Accident & I. Co. v. N. O. Nelson Mfg. Co.*, 291 U.S. 352, 358, 54 S. Ct. 394, the Court said (l.c. 394):

"[1] As to the meaning of the statute now challenged as invalid, the Supreme Court of Mississippi speaks with ultimate authority. Supreme Lodge, Knights of Pythias v. Meyer, 265 U.S. 30, 32, 44 S. Ct. 432, 68 L. Ed. 885; Great Northern R. Co. v. Sunburst Co., 287 U.S. 358, 362, 53 S. Ct. 145, 77 L. Ed. 360, 85 A.L.R. 254; Guaranty Trust Co. v. Blodgett, 287 U.S. 509, 513, 53 S. Ct. 244, 77 L. Ed. 463."

In the case of *Terminiello* v. *City of Chicago*, 337 U.S. 1, 4, 69 S. Ct. 894, the Court said (l.c. 895):

"That construction of the ordinance is a ruling on a question of state law that is as binding on us as though the precise words had been written into the ordinance. See Hebert v. Louisiana, 272 U.S. 312, 317, 47 S. Ct. 103, 104, 71 L. Ed. 270, 48 A.L.R. 1102;

Winters v. New York, 333 U.S. 507, 514, 68 S. Ct. 665, 669, 92 L. Ed. 840."

The Missouri Supreme Court in this case specifically overruled all Constitutional objections. Appendix P. A25, Jurisdictional Statement; 359 S.W.2d, l.c. 800.

Furthermore, it was not necessary that the Missouri Courts directly specify that they are upholding the validity of the Missouri Statutes as against the Constitutional objections when the practical effect and operations of such ruling as applied and enforced by the Missouri State Courts is to uphold their validity as denying appellants all right of recovery. *Detroit United Railway* v. *Michigan*, 242 U.S. 238, 37 S. Ct. 87, 90; *Georgia Ry. & Power Co.* v. *Town of Decatur*, 262 U.S. 432, 439, 43 S. Ct. 613, 616.

In the case of *Poulos* v. *State of New Hampshire*, 345 U.S. 395, 403, 73 S. Ct. 760, the Court said (l.c. 875):

> "While there was no assertion of the invalidity of the ordinance on its face, the Supreme Court determined the validity of the ordinance as applied. See Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 287, 42 S. Ct. 106, 107, 66 L. Ed. 239; Charleston Federal Sav. & Loan Ass'n v. Alderson, 324 U.S. 182, 185-186, 65 S. Ct. 624, 627, 89 L. Ed. 957."

In the cases of *Wheeling Steel Corporation* v. *Glander*, 337 U.S. 562, 570, 69 S. Ct. 1291, this Court said (l.c. 1296):

> "The State action which is reviewable under the Fourteenth Amendment is the composite result of both legislation and its judicial interpretation."

II.

**Appellants Have Been Denied Due Process of Law.**

While admitting Barker and Jacobs have never had a decision on the merits on their claim for fees (Aetna's

Motion, p. 10) Appellees assert that because they had access to the Courts long enough in each instance to be handed a ruling denying them a hearing on the merits until finally in this case all remedies were denied them that they have thereby obtained all the benefit of due process guaranteed by the Fourteenth Amendment to the Constitution. Rides on such a procedural merry-go-round which goes nowhere is a far cry from the procedure leading to a decision on the merits as contemplated by the Fourteenth Amendment.

In the case of *Palko* v. *State of Connecticut*, 302 U.S. 319, 327, 58 S. Ct. 149, this Court said (l.c. 153):

> "Fundamental too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. Scott v. McNeal, 154 U.S. 34, 14 S. Ct. 1108, 38 L. Ed. 896; Blackmer v. United States, 284 U.S. 421, 52 S. Ct. 252, 76 L. Ed. 375. The hearing, moreover, must be a real one, not a sham or a pretense. Moore v. Dempsey, 261 U.S. 86, 43 S. Ct. 265, 67 L. Ed. 543; Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A.L.R. 406."

In the case of *Carter* v. *People of State of Illinois*, 329 U.S. 173, 175, 67 S. Ct. 216, the Court said (l.c. 218):

> "The solicitude for securing justice thus embodied in the Due Process Clause is not satisfied by formal compliance or merely procedural regularity."

In the case of *Fay* v. *People of State of New York*, 332 U.S. 261, 67 S. Ct. 1613, the Court said (l.c. 1628):

> "But this Court has construed it to be inherent in the independent concept of due process that condemnation shall be rendered only after a trial, in which the hearing is a real one, not a sham or pretense. Palko v. State of Connecticut, 302 U.S. 319, 327, 58

S. Ct. 149, 153, 82 L. Ed. 288; Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A.L.R. 406; Moore v. Dempsey, 261 U.S. 86, 43 S. Ct. 265, 67 L. Ed. 543."

In the case of *Market St. Ry.* v. *Railroad Commission*, 324 U.S. 548, 562, 65 S. Ct. 770, the Court said (l.c. 777):

> "But due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties."

Due process is far more than a mere procedural exercise as appellees contend. It is designed to put in operation procedures which will bring about a decision on the merits, that is ultimate justice. It is an end to a means and not itself the end as appellees would have it.

The construction put on the Insurance Code and Administrative Procedure Act deprives appellants of any right to redress by any effective procedure.

In the case of *Gibbes* v. *Zimmerman*, 290 U.S. 326, 332 54 S. Ct. 140, the Court said (l.c. 142):

> "[2, 3] The appellant says the Act of March 9 arbitrarily deprives him of a remedy for the enforcement of stockholders' liability, which remedy was his property and was taken from him without due process. But although a vested cause of action is property and is protected from arbitrary interference (Pritchard v. Norton, 106 U.S. 124, 132, 1 S. Ct. 102, 27 L. Ed. 104), the appellant has no property, in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure. Iowa Central Ry. Co. v. Iowa, 160 U.S. 389, 393, 16 S. Ct. 344, 40 L. Ed. 467; Backus v. Fort St. Union Depot Co., 169 U.S. 557, 571, 18 S. Ct. 445, 42 L. Ed. 853; Crane v. Hahlo, 258 U.S. 142, 147,

42 S. Ct. 214, 66 L. Ed. 514; Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co., 284 U.S. 151, 158, 52 S. Ct. 69, 76 L. Ed. 214."

Due process contemplates the administration of justice through proceedings which lead to a fair trial and just decision on the merits.

In the case of *Baltimore & Ohio R. R. Co.* v. *United States*, 298 U.S. 349, 369, 56 S. Ct. 797, 807-808, 80 L. Ed. 1209, 1224, this Court said that due process "includes the right to introduce evidence and have judicial findings based upon it."

Barker and Jacobs have been denied that right.

In the case of *Missouri* v. *Lewis*, 101 U.S. 22, 30, this Court said due process also included the "right to resort to the appropriate Courts for redress."

Barker and Jacobs have been denied that right in practical effect. They have never been heard on the merits.

In the case of *Barbier* v. *Connolly*, 113 U.S. 27, 31, this Court said due process under the Fourteenth Amendment undoubtedly intended that all persons "should have like access to the courts of the country for protection of their person, and property, the prevention and redress of wrongs, and the enforcement of contracts".

It requires no argument to demonstrate that the limited procedural access to the Courts permitted Barker and Jacobs herein does not begin to satisfy the requirements of dur process as defined by this Court.

The Superintendent gave no valid reason for not allowing these claims and initiating the proceedings for their payment. His action was an abuse of discretion, arbitrary, capricious, discriminatory and oppressive. Nevertheless the Missouri Supreme Court held it was within his

unbridled discretion to pay his attorneys or not to pay them. 359 S.W.2d, l.c. 799, where it is said the superintendent "cannot be convicted of abuse of any discretionary power vested in him under those statutes in refusing to certify the fees here sought for payment by either defendant insurance companies, or any of them, or by assessing them as an expense of the Division of Insurance."

The construction of these Missouri procedural statutes by the Missouri Supreme Court to give the Superintendent unbridled and uncontrolled discretion to refuse to compensate appellants for their services fully performed under a valid contract with no access to the Courts is unconstitutional and void.

In the case of *Porporis* v. *City of Warson Woods*, Mo. Sup., 352 S.W.2d 605, the Court said (l.c. 607):

> "It is true, as plaintiffs suggest, that an ordinance or statute which 'attempts to clothe an administrative officer with arbitrary discretion, without a definite standard or rule for his guidance' is unconstitutional. Lux v. Milwaukee Mechanics Ins. Co., 322 Mo. 342, 15 S.W.2d 343 cited by plaintiffs."

In the case of *A. L. A. Schechter Poultry Corporation* v. *United States*, 295 U.S. 495, 537, 541-542, 55 S. Ct. 837, the Court said (l.c. 846):

> "But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry. . . See Panama Refining Company v. Ryan, supra, and cases there reviewed."

(l.c. 848:)

> "In view of the scope of that broad declaration and of the nature of the few restrictions that are im-

posed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."

In the case of *United States* v. *Rock Royal Co-Op, Inc., et al.*, 307 U.S. 533, 576, 59 S. Ct. 993, this Court said (l.c. 1014):

"A right by statute is given handlers to object to the Secretary to any provision of an order as not 'in accordance with law,' with the privilege of appeal to the courts. Section 8c (15) (A) and (B). Even though procedural safeguards cannot validate an unconstitutional delegation, they do furnish protection against an arbitrary use of properly delegated authority."

Grant of unbridled administrative discretion as here is unconstitutional and void. *Bowles* v. *Willingham*, 321 U.S. 503, 514-516, 520, 64 S. Ct. 641, 647, 648, 650; *Yakus* v. *United States*, 321 U.S. 414, 442, 64 S. Ct. 660, 676 (33); *American Power & Light Co.* v. *Securities & Exch. Com'n*, 329 U.S. 90, 105, 106, 67 S. Ct. 133, 142.

On Page 9 of its argument in support of its motion filed herein Aetna assumes a pose of injured innocence claiming it discharged its full obligation by contributing its share to payment of the judgment of restitution, and that in return therefor it was released from "further liability of every kind and character arising from the restitution proceeding."

Not only were Aetna and the other guilty companies found civilly liable and required to refund in full all premiums unlawfully collected but in *State* v. *American Insurance Company*, 355 Mo. 1053, 200 S.W.2d 1, Aetna

and 121 other of the guilty companies were subsequently fined for bribery of the Superintendent of Insurance in connection with related subject-matter in the sum of Two Million Ninety Thousand ($2,090,000.00) Dollars. Aetna's share of the fine was Forty-three Thousand ($43,000.00) Dollars. 200 S.W.2d, l.c. 53.* That contradicts Aetna's claim of such full release. Aetna's concept of "fair play" seems to us a little selfish and distorted. They and their co-conspirator insurance companies first defy the order of the Superintendent of Insurance by collecting premiums in excess of the lawful rate involving him in long and expensive litigation to compel restitution. Then they bribe the Superintendent of Insurance to make a compromise settlement which is set aside and a quo warranto proceeding brought against them to oust them or punish them resulting in heavy fines. Now they insist it is better that Barker and Jacobs, who, in the public interest, devoted their time and money for six years to prosecuting the proceedings for the Superintendent and forcing the restitution, should go wholly unreimbursed and unpaid than that they should have to make any contribution to such payment under either provisions of the Missouri Insurance Code in force during all this litigation.

Such alleged release was in any event void and unenforcible.

The Missouri Supreme Court has consistently held that any judgment contrary to the Insurance Code is void. *Aetna Insurance Co. v. O'Malley*, 118 S.W.2d 3, l.c. 8-10. This necessarily includes stipulations between the Super-

*Decided in 1946, approximately 8 years after the case of *Aetna Ins. Co. v. O'Malley*, (1938) 124 S.W.2d 1164, relied upon by appellees which was rendered before discovery of the bribery and fraud.

intendent and the guilty companies embodied in an order of Court in the very case and record relied on.

In the *Aetna* case, *supra*, there was a stipulation permitting the companies to collect and hold the premiums pending litigation over validity of the 10% rate reduction. An order of Court was entered. The statute required excess premiums to be deposited with the Superintendent. On order for restitution the Circuit Court ordered the restitution fund to be deposited with Cook and Lauf as commissioners and custodians. The custodians were also appointed referees to conduct hearings and make refunds. (113 S.W.2d 3, l.c. 7).

In the *Aetna* case, *supra*, on collateral attack the Supreme Court held all orders contrary to the Insurance Code void. (This would include the order relied on if it attempted to release the companies from statutory liabilities.) In so holding the Supreme Court said, in part (118 S.W.2d, l.c. 9):

> "Under the plain terms of the statute, as interpreted by this Court in the case last above cited, the fund in question should have been handled by the companies, wholly independent of the circuit court, and without any court order whatever. That is, it was the statutory duty of the superintendent to hold such excess until litigation ended, then turn same over to the parties entitled thereto under the final judgment of the Court in the review action. • • •
>
> "It will not do to say that because the Court had jurisdiction of the subject matter of restitution and of the parties, any order made or judgment rendered in that action, if wrong, was merely erroneous, but not void for want of jurisdiction. Although a court has jurisdiction of the subject matter of an action it cannot exceed the jurisdiction."

In holding all stipulations and orders in the *Aetna* case, in violation of the Insurance Code, the Court has made it clear that no agreement or judgment of Court contrary to the Insurance Code has any validity. It is void.

We do not believe the Superintendent and the Trial Court in 1936 intended to release the companies from the statutory assessment liabilities for expenses of the Insurance Department or for expenses of proceedings against companies.

If they did do so (which we deny) the opinion of this Court in the same case in 1938 (124 S.W.2d 1164) makes it clear that all orders and stipulations not consistent with the Insurance Code are void.

So it is clear from the opinion in the *Aetna* case (118 S.W.2d 3) that even an agreement of the Superintendent and a judgment entered thereon in conflict with the procedure of the Insurance Code is void, not merely erroneous. In fact the stipulations for settlement which were the basis for the judgment claimed to release Aetna and the other insurance companies was found to have been obtained by bribery and were held to be void. *State v. American Ins. Co.*, Mo. Sup., 200 S.W.2d 1, l.c. 7.

It is also clear that the Superintendent is acting in excess of his powers when he enters into an agreement contrary to the Insurance Code. This has been the defense to enforcement of that part of the contract of Barker and Jacobs for a fee to be paid out of the funds recaptured. *Aetna Ins. Co. v. O'Malley*, 124 S.W.2d 1164, hoildng part of the employment contract void, part good.

The authority, duty and power to determine whether attorney's fees allowed herein be assessed against the guilty companies as incurred in a proceeding against companies or against all companies as an expense of the in-

surance department is a matter which must be determined in the first instance by the superintendent of insurance. *Jacobs* v. *Leggett*, Mo. Sup., 295 S.W.2d 825, 835 (16); *Barker* v. *Jacobs*, Mo. Sup., 295 S.W.2d 836, 840 (3).

The regulation of the insurance business is held to properly come within the police power of the state. *State ex rel. Lucas* v. *Blair*, 346 Mo. 1017, 144 S.W.2d 106, 108 (6); *State ex rel. Mackey* v. *Hyde*, 315 Mo. 681, 286 S.W. 363, 365 (2); *State ex Inf. McKittrick* v. *Koon*, 356 Mo. 284, 201 S.W.2d 446, 452 (1).

Art. II, Sec. 3, Mo. Const., 1945, provides that the police power of the state shall never be surrendered, abridged or construed to infringe the equal rights of individuals or the general well-being of the state. *May Department Stores Co.* v. *Union Electric L. & P. Co.*, Mo. Sup., 107 S.W.2d 41, 48(3); *City of St. Louis* v. *Cavanaugh*, Mo. Sup., 207 S.W.2d 449, 454, 455.

The construction of the alleged release agreement claimed by Aetna would effect a surrender or abridge the right of the superintendent to assess attorney fees against the guilty parties and is void and of no force and effect. *State ex rel. Lucas* v. *Blair*, 346 Mo. 1017, 144 S.W.2d 106, 109; *May Department Stores Co.* v. *Union Electric L. & P. Co.*, Mo. Sup., 107 S.W.2d 41, 48; *State ex rel. Consumers Public Service Co.* v. *Public Service Commission*, 352 Mo. 905, 108 S.W.2d 40 (4); *Railway Exchange Building* v. *Light & Development Co.*, Mo. Sup., 107 S.W.2d 59, 61; *Kalbfell* v. *City of St. Louis*, Mo. Sup., 211 S.W.2d 911, 918 (13).

The superintendent of insurance is an administrative agency with limited contractual authority; he is a creature of the statutes and has no more power than the statutes

give him. *Jacobs* v. *Leggett*, Mo. Sup., 295 S.W.2d 825, 832 (9, 10, 11); *Barker* v. *Leggett*, Mo. Sup., 295 S.W.2d 836, 839 (1).

Like other administrative tribunals the superintendent is a creature of the legislature and does not have any jurisdiction or authority except that which the legislature has conferred upon him; this authority cannot be enlarged by waiver, estoppel, or by contract, or compromise. *Soars* v. *Soars-Lovelace, Inc.*, Mo. Sup., 142 S.W.2d 866, 871 (7-11); *Hogue* v. *Wurdack*, Mo. App., 298 S.W.2d 492, 498, footnote 8 and cases therein cited; *State ex rel. Wabash Ry. Co.*, Mo. Sup., 267 S.W. 102, 108 (8).

The superintendent of insurance could not "even with the approval of the court, delegate his power or duties, or surrender assets which the law compels him to administer." *Hentschel* v. *Fidelity & Deposit Co. of Maryland*, 8 Cir., 87 F.2d 833, 838 (8); *Leggett* v. *General Indemnity Exchange*, Mo. Sup., 250 S.W.2d 710, 716. It necessarily follows he could not surrender his authority to assess the guilty companies as a means of defraying expenses of proceedings against Aetna and the other guilty parties.

As the superintendent of insurance was a public officer the guilty insurance parties entered into such alleged release agreement with notice of his lack of jurisdiction and authority to enter into such an agreement. *Bride* v. *City of Slater*, 263 S.W.2d (l.c. 26). *Elkins-Sawyers Office Equipment Co.* v. *Moniteau County*, Mo. Sup., 209 S.W.2d 127, 131; and cases therein cited. *Grauf* v. *City of Salem*, Mo. App., 283 S.W.2d 15, 17; *County of St. Francois* v. *Brookshire*, Mo. Sup., 302 S.W.2d 1, 4 (7); *Fleshner* v. *Kansas City*, Mo. Sup., 156 S.W.2d 706 (8).

The alleged release agreement is also void as calculated to impede the regular administration of justice

and against public policy. *Boatmen's Nat. Bank of St. Louis* v. *Wurdeman*, 344 Mo. 673, 127 S.W.2d 438, 440 (6).

III.

**The Judgments Herein Impair the Obligation of Plaintiffs' Contract.**

It is contended by Aetna that no legislative action by the state is involved or claimed to have impaired substantial contractual rights. That has been answered in part in the first point in this brief. In further answer we desire to state as follows:

In the case of *Appleby* v. *City of New York*, 271 U.S. 364, 379, 46 S. Ct. 569, this Court, speaking through Mr. Chief Justice Taft, said (l.c. 573):

> "The questions we have here to determine are First, was there a contract: Second, what was its proper construction and effect: and, Third, was its obligation impaired by subsequent legislation as enforced by the State Court."

See to like effect *Houston & Texas C. R. Co.* v. *Texas*, 177 U.S. 66, 77, 20 S. Ct. 545, 549 (44 L. Ed. 673).

Appellees suggest, without support of authority that because the part of Appellants' contract providing for payment for their services out of the fund collected is unenforceable that means they have no legal claim for payment. The law of Missouri is to the contrary.

In the case of *Nibler* v. *Coltrane*, Mo. Sup., 275, the Court stated the law of Missouri as follows (l.c. 273):

> "Under the allegations of the second count, which alone was submitted to the jury, plaintiff sought to recover the reasonable value of the services of the type and kind mentioned and rendered under the circumstances alleged. From the facts alleged an inference

can be drawn that the services were not gratuitously rendered and that they had not been paid for. It was therefore wholly immaterial that the express contract alleged in the first count or re-incorporated in the second count may have been void and unenforceable for the reasons mentioned by appellant. The rule is stated in 58 Am. Jur. 539, Work and Labor, Sec. 35, as follows: 'When one furnishes labor to another under a contract which, for reasons not prejudicial to the former, is void and of no effect, he may recover the value of his services on a quantum meruit as a benefit to the person receiving them. The law recognizes that services not gratuitous, and neither mala in se nor mala prohibita rendered under an agreement that is invalid or unenforceable, furnish a basis for an implied or constructive contract to pay their reasonable value.' And further, 58 Am. Jur. 541, Work and Labor, Sec. 38, '* * * although there is authority to the contrary, the weight of authority supports the proposition that if the services are not themselves illegal, either intrinsically or by reason of the circumstances under which they are rendered, recovery may be had on a quantum meruit for their reasonable value, although the contract is for other reasons illegal. This is true where one of a number of acts contemplated is not malum in se but merely malum prohibitum. Thus, although the express contract is in no respect enforceable, either as a foundation for a suit or a cross action or as a defense to the original action, or in any other manner, recovery is proper on quantum meruit if the contract is repudiated before the unlawful act is performed.' And see 71 C.J., p. 84, Work and Labor, §§ 45 and 46; Wright v. Broome, 67 Mo. App. 32, 36."

The Missouri Courts have repeatedly held there was a contract (359 S.W.2d, l.c. 793, 799 (1)) and that it meant the Superintendent of Insurance was under duty to pay plaintiffs a reasonable fee for their services. We are here concerned only as to the effect of subsequent legislation.

At the time this contract was entered into in June, 1930 (359 S.W.2d, l.c. 792), the Missouri Department of Insurance headed by the Superintendent of Insurance was a self-sustaining department of the Government required by law to depend exclusively for revenue for its support upon fees and assessments made by the Superintendent against the Insurance Companies doing business in the State. *State ex rel. Leggett v. Jensen*, Mo. Sup., 318 S.W.2d, l.c. 355; Sections 5685, 5686 and 5688, R.S. Mo. 1929 (Now Sections 374.220, 374.230 and 374.260, R.S. Mo., 1959).

Out of the funds so collected it was the duty of the Superintendent to pay all expenses of the Insurance Department, including attorneys' fees. *State ex rel. Lucas v. Blair*, 346 Mo. 1017, 144 S.W.2d 106, 109 (2).

Section 5685, R.S. Mo., 1929, provided the expenses of proceedings against insurance companies should be assessed by the Superintendent against the insurance companies proceeded against. Section 5688, R.S. Mo., 1929, provided any deficiency in revenue to meet expenses should be raised by assessment against the insurance companies. At that time there was no Administrative Procedure Act in Missouri, and the common law remedies were available to collect attorney's fees from the Superintendent.

At the bottom of Page 9 of Aetna's argument it is stated that after 26 years Barker and Jacobs are now attempting to collect against them through assessment by the Superintendent. That statement is misleading. For 26 years (359 S.W.2d, l.c. 792) they have had a claim pending before the Superintendent and have been trying to get the Superintendent to allow them a fee and raise the funds for payment in either of the two ways provided by statute—one of which was assessment against the guilty companies, one of which was Aetna.

The Missouri Constitution adopted in 1945 contained a provision for judicial review of the proceedings of administrative agencies. Art V, Sec. 22, Mo. Const., 1945. Vol. 2, Vernon's Annotated Missouri Statutes, Page 293.

In 1945 the Missouri Legislature passed an Administrative Procedure Act, Laws of Missouri, 1945, p. 1504, Sections 1 to 10 (now Chapter 536, R.S. Mo., 1959). Under the provisions of this Act the common law remedies of Barker and Jacobs were taken away and proceedings under the Administrative Procedure Act made their exclusive remedy to enforce collection from the Superintendent of Insurance. *Jacobs* v. *Leggett*, 295 S.W.2d 825; *Barker* v. *Leggett*, 295 S.W.2d 836; *State ex rel Leggett* v. *Jensen*, 318 S.W.2d 353. The present opinion and judgment of the Supreme Court of Missouri in this case construes the insurance code and the Administrative Procedure Act as affording them no remedy for an admittedly valid contract validly performed.

In the case of *Detroit United Railway* v. *Michigan*, 242 U.S. 238, 37 S. Ct. 87, this Court said (l.c. 89):

> "But in this case there were state laws passed subsequent to the making of the alleged contracts in question, in the form of the legislation of 1905 and 1907 extending the corporate limits of the city. And it is not correct to say that the decisions of the state court turned upon the mere meaning of the contracts without reference to these subsequent laws."

(l.c. 90;)

> "But in cases of this character, the jurisdiction of this court does not depend upon the form in which the legislative action is expressed, but rather upon its practical effect and operation as construed by the state court of last resort, and this irrespective of the process or reasoning by which the decision is reached, or the

precise extent to which reliance is placed upon the subsequent legislation. (Citing cases) The necessary operation of the decisions under review is to give an effect to the annexation statutes what substantially impairs the alleged contract rights of plaintiff in error as they theretofore stood; and it makes no difference that the result was reached in part by invoking the provisions of another agreement supposed to be binding upon plaintiff in error."

See to like effect *Georgia Ry. & Power Co.* v. *Town of Decatur*, 262 U.S. 432, 439, 43 S. Ct. 613, 616.

Also in the 1945 Missouri Constitution, Art. IV, Sections 22 and 25, there was created a Governor's Budget System, providing only items recommended in the budget could be acted upon until all budgeted items were acted upon. The superintendent refuses to budget this fee item thereby making relief from the legislature wholly illusory.

By taking away all remedies for enforcement of their contract by the construction of the Missouri Insurance Code and Missouri Administrative Procedural Act the State of Missouri has impaired the obligation of appellants' contract in violation of their rights under Article I, Section 10, of the Federal Constitution.

In the case of *Richmond Mortgage & Loan Corporation* v. *Wachovia Bank & Trust Co.*, 300 U.S. 124, 128, 57 S. Ct. 338, the Court said (l.c. 339):

"The applicable principle is not in dispute. The Legislature may modify, limit, or alter the remedy for enforcement of a contract without impairing its obligation, but in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right."

See to like effect *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 429-431, 54 S. Ct. 231, 237.

Under the construction of these statutes by the Missouri Supreme Court appellants are denied any means of enforcement of their contracts.

In the case of *Home Bldg. & L. Ass'n* v. *Blaisdell*, 290 U.S. 389, it is said (l.c. 429):

> "The obligation of a contract is 'the law which binds the parties to perform their agreement.' * * * Nothing can be more material to the obligation than the means of enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion."

We can conceive of no greater impairment of the obligation of appellants' contract than the removal of all remedy and means of enforcing it. By the construction of subsequently enacted statutes Missouri has not merely impaired its obligation, but completely destroyed appellants' theretofore valid and enforcible contract.

In the case of *Atlantic Coast Line R. Co.* v. *Phillips*, 332 U.S. 168, 170, 67 S. Ct. 1584, this Court said (l.c. 1585):

> "A claim that a State statute impairs the obligation of contract is an appeal to the United States Constitution, and cannot be foreclosed by a State court's determination whether there was a contract or what was its obligation."

In its opinion herein the Missouri Supreme Court held, 359 S.W.2d (l.c. 799):

> "The superintendent of insurance, however, is merely an official of the executive branch of state government, with powers limited to functions prescribed by the statutes relating to the Division of Insurance. As such, he cannot be convicted of abuse of any discretionary power vested in him under the

statutes in refusing to certify the fees here sought for payment by either defendant insurance companies, or any of them, or by assessing them as an expense of the Division of Insurance."

Clearly the Superintendent's refusal to act here is within the functions prescribed by the statutes as within his powers and duties. In fact the opinion herein holds that he alone may perform that function. The above holding gives the Superintendent unbridled discretion to pay or refuse to pay any of the obligations of the Division of Insurance with no recourse for those he chooses not to pay. The refusal of the Superintendent to pay appellants impairs the obligation of appellants' contract and is without reasonable cause, arbitrary, capricious, discriminatory and an abuse of discretion in violation of their Constitutional rights as more fully set out under Point II, *supra*. Please see cases there cited.

Appellants do have a legal right to be paid and the denial of any judicial forum or remedy for the arbitrary action of the Superintendent is a denial of their Constitutional rights.

IV.

**Appellants Have Been Denied the Equal Protection of the Law.**

The Insurance Code and the Administrative Procedure Act of the State of Missouri have been held to afford remedies for collection of attorney's fees for services rendered the Superintendent of Insurance. *State ex rel. Lucas* v. *Blair*, 346 Mo. 1017, 144 S.W.2d 106, 109; *Jacobs* v. *Leggett*, Mo. Sup., 295 S.W.2d 825, 830; *Barker* v. *Leggett*, Mo. Sup., 295 S.W.2d 836, 839; *State ex rel. Leggett* v. *Jensen*, Mo. Sup., 318 S.W.2d 353, 355. Those are all

decisions of the Supreme Court of Missouri, *en Banc*, which have never been overruled by that Court. Such statutes are construed by the Missouri Supreme Court to provide an effective remedy for the collection of all claims, including attorney's fees, against the Superintendent for everyone except Barker and Jacobs. No reason is given, or can be given, as to why they are excluded. Such action is purely arbitrary.

This clearly constitutes unjustifiable discrimination and a denial to appellants of the equal protection of the law is in violation of the Fourteenth Amendment to the Constitution of the United States.

In *Hartford Steam Boiler Inspection & Ins. Co.* v. *Harrison*, 301 U.S. 459, 461, 57 S. Ct. 838, the Court said (l.c. 839):

> "'it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, Kentucky Railroad Tax Cases, 115 U.S. 321, 337, 6 S. Ct. 57, 29 L. Ed. 414; Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283, 293, 18 S. Ct. 594, 42 L. Ed. 1037, and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation.'"

In the case of *Watson* v. *Buck*, 313 U.S. 387, 402, 61 S. Ct. 962, this Court said (l.c. 967):

> "A law which is constitutional as applied in one manner may still contravene the constitution as applied in another."

These statutes as applied to Barker and Jacobs contravene their constitutional rights.

In the case of *Missouri* v. *Lewis*, 101 U.S. 22, this Court in speaking of the Fourteenth Amendment said (l.c. 30):

> "It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."

In *Duncan* v. *Missouri*, 152 U.S. 377, it is said:

> "And due process of law and equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to the arbitrary exercise of the power of government."

In the case of *Barbier* v. *Connolly*, 113 U.S. 27; l.c. 31; 28 L. Ed. 923, this Court held (l.c. 925):

> "The Fourteenth Amendment • • • undoubtedly intended • • • that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts."

In the case of *Missouri* v. *Lewis*, 101 U.S. 22, 30, this Court said the Fourteenth Amendment prevents any state from denying to any person "the equal right to resort to the appropriate Courts for redress." See to like effect: *Barbier* v. *Connolly*, 113 U.S. 27, 31, 28 L. Ed. 923, 925.

For all the reasons set forth in our Jurisdictional Statement and this Brief we respectfully ask that appellee's Separate Motions to Affirm or Dismiss be overruled and this cause set down for hearing on the merits.

Respectfully submitted.

Walter A. Raymond

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**PROOF OF SERVICE.**

I, Walter A. Raymond, counsel for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I served copies of the foregoing Suggestions to the Separate Motions of Appellees to Affirm or in the Alternative Dismiss the Appeal on all adverse parties as follows:

1. On the Superintendent of the Division of Insurance of the State of Missouri by depositing two copies in the United States Mail, with regular postage prepaid, in an envelope addressed to Honorable Thomas F. Eagleton, Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, Missouri, on the 8th day of January, 1963.

2. On the Aetna Insurance Company and other named Stock Fire Insurance Companies who were defendants in the Restitution Suit by depositing two copies in the United States Mail, with regular postage prepaid, in an envelope addressed to their attorney of record, Honorable James M. Douglas, 705 Olive Street, St. Louis 1, Missouri, on the 8th day of January, 1963.

3. On the State Farm Mutual Insurance Company by depositing in the United States Mail, with regular postage prepaid, two copies in an envelope addressed to its attorney of record, Mr. Thomas E. Deacy, Sr., 2300 Bryant Building, Kansas City 6, Missouri, on the 8th day of January, 1963.

4. On the Hardware Mutual Casualty Company by depositing in the United States Mail, with regular postage prepaid, two copies in an envelope addressed to its attorney

of record, Mr. George A. Spencer, 517 Guitar Building, Columbia, Missouri, on the 8th day of January, 1963.

Walter A. Raymond

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